In forma pauperis
Petition not printed

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IN THE MES-MU

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 962

JOSEPH MESCALL,

Petitioner,

vs.

W. T. GRANT COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

A. Respondent had no duty to limit the hours of employment or to maintain a particular temperature.

(1) There was no limitation, either at common law or by the statutes of Ohio upon the number of hours of employment and no liability can be imposed upon an employer for injuries allegedly caused by long hours of work.

Lang v. *United States Reduction Co. (C. C. A. 7th C.)*, 110 Fed. (2d) 441, 443;
Tobin v. *Detroit T. & I. R. Co.*, 57 Ohio App. 306, 318;
Jackson v. *Cincinnati Gas & Electric Co. (Ohio Court of Appeals)*, 42 N. E. (2d) 218, 219;
Louisville & N. R. Co. v. Sawyers, 169 Ky. 671, 673, 674;
Swift & Co. v. *Rutkowski*, 167 Ill. 156, 159; 47 N. E. 362.

(2) The requirement that an employer furnish a safe place to work imposes no duty to maintain a uniform temperature in all parts of the place of employment.

Louisville & Nashville R. R. v. *Williams,* 165 Ky. 386, 390, 391;

B. The law of both Indiana and Ohio requires the Court to direct the verdict where not to do so would allow the jury to speculate and guess.

Hamden Lodge No. 517, I. O. O. F. v. *Ohio Fuel Gas Co.,* 127 Ohio State 469, 482;

Bond Stores, Inc. v. *Miller,* 49 Ohio App. 470, 477;

Bevan v. *New York, C. & St. L. R. Co.,* 132 Ohio State 245, 252;

Orey v. *Mutual Life Insurance Co. of New York,* 215 Ind. 305, 309, 310;

Pontiac-Chicago Motor Express Co. v. *George Cassons & Sons,* 109 Ind. App. 248, 252.

C. (1) In Indiana to invoke the doctrine of equitable estoppel the acts relied upon must be of an affirmative character and fraudulent.

Landers v. *Evers,* 107 Ind. App. 347, 349, 350;

Tinsley v. *Fruits,* 20 Ind. App. 534, 542;

(2) Estoppel can never arise from ambiguous facts but must be established by such as are unequivocal and not susceptible to two constructions; it must not rest in mere inference or argument:

Wilkerson v. *Wood*, 81 Ind. App. 248, 254;

Tinsley v. *Fruits*, 20 Ind. App. 534, 542;

Fletcher v. *Magill*, 110 Ind. 395, 404.

(3) Fraud will not be presumed but it must be proved by the party who alleges it.

Edwards v. *Hudson*, 214 Ind. 120, 122;

Wills v. *Mooney-Mueller Drug Co.*, 50 Ind. App. 193, 199;

Adams v. *Langel*, 144 Ind. 608, 612.

ARGUMENT

POINT A

The decision of the Circuit Court of Appeals holds that under the Section 871-15 of the Ohio Code the respondent's duty was to use "reasonable care—reasonable depending upon the danger attending the place—to eliminate defects in the *physical equipment used.*" It further held there was no statute in the State of Ohio specifically limiting the hours of employment and no known duty to maintain a uniform temperature. None of the cases cited by plaintiff under Point IV of the Petition (pp. 8-9) is incompatible with this opinion.

The case of *Ohio Automatic Sprinkler Co.* v. *Fender,* 108 Ohio State 149, was based upon the breach of Section 1027 of the Ohio Code (a section not here involved) which did impose a duty to guard dangerous machinery. Petitioner alleged the failure to furnish a particular safety device, as shown by the recent decision of *Jackson* v. *Cincinnati Gas & Electric Co.* (Court of Appeals of Ohio), 42 N. E. (2d) 218, where the Court said (p. 219):

> "There is no essential difference as far as the rule of evidence and procedure is involved between care required by the rules of common law and safety required by the statute. The case of Ohio Automatic Sprinkler Co. v. Fender, 108 Ohio St. 149, 141 N. E. 269, does not hold otherwise. This case dealt with the failure of an employer to provide a specific safety device required by statute. No latitude of comparison was involved. The device was either there or it was not. The statute was met with compliance or it was violated. Such is not the situation here. Had the statute under consideration in this

> case for example required an iron ladder and a wooden one had been used, there could be no occasion for the employment of the rule requiring evidence of comparative standards as to the use of wooden ladders. The statute would be violated and that would be the end of the matter. In the word 'safe' such latitude of comparison exists."

Baltimore & Ohio R. Co. v. *Groeger,* 266 U. S. 521, was a suit arising out of an employee's death due to an explosion of a boiler alleged to have been caused by a breach of the Federal Employer's Liability Act of 1908 and the Federal Boiler Inspection Act of 1911. It was based entirely upon alleged defects in the physical equipment in violation of the two statutes.

Likewise, *Jeffersonville Manufacturing Company* v. *Holden,* 180 Ind. 301, was based upon an alleged defect in the physical equipment in violation of an Indiana Statute requiring all machinery to be "properly guarded." Plaintiff's injury resulted from the employer's failure to furnish a guard which could have been applied without impairing the usefulness of the machine.

In harmony with the opinion of the Circuit Court of Appeals is the case of *Tobin* v. *Detroit T. & I. R. Co.,* 57 Ohio App. 306, where the Court held that the word "secure" as used in Title 45, Section 11, U. S. Code, 45 L.S.C.A. Sec. 11, which provides *inter alia,* that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards" refers only to mechanical and structural character of running boards and therefore it is not shown a running board is insecure by proof that frost has accumulated on it.

POINT B

In holding the circumstantial evidence insufficient to go to the jury on the question of causation petitioner asserts the opinion of the Circuit Court of Appeals is contrary to three Ohio decisions and therefore violates *Erie Railroad Co.* v. *Tompkins*. The cited Ohio decisions apply the so-called "scintilla" rule. The earliest of the three, *Ellis & Morton* v. *Ohio Life Insurance & Trust Co.*, 4 Ohio State 628, apparently was the origin of that rule in Ohio. All of these cases, *Ellis & Martin* vs. *Ohio Life Insurance & Trust Co.*, specifically, were overruled in the case of *Hamden Lodge No. 517, I.O.O.F.* vs. *Ohio Fuel Gas Co.* (1934), 127 Ohio State 469. In sustaining a directed verdict in that case the Court said (p. 252):

> "There was some evidence or rather some facts from which a slight inference of the necessary ownership or control might be drawn and if the so-called scintilla rule prevailed now in Ohio the trial court was right in submitting the question to the jury.
>
> * * * * *
>
> "But to say that the court must send the case to the jury whenever there is any evidence, no matter how slight, which tends to support a party's claim, is, in extreme cases, to permit the jury to play with shadowy and elusive inferences which the logical mind rejects. Before the judge is required to send the case to the jury, there should be in evidence something substantial from which a reasonable mind can draw a logical deduction.
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> * * * * *
>
> "The second and third paragraphs of the syllabus in Ellis & Morton v. Ohio Life Insurance & Trust Co., supra, and the case of Clark v. McFarland, supra, are hereby overruled."

Commenting upon this rule in *Bond Stores, Inc.* vs. *Miller* (1935), 49 Ohio App. 470, the Court at page 477 said:

> "This distinction was not always clearly kept in mind by the courts, including even the Supreme Court, and for that reason the said court, in the case of Hamden Lodge v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246, decided to expressly abandon the scintilla rule and substitute therefor a rule which does permit both the trial and reviewing courts to weigh the evidence, whether of disputed facts or inferences, to the extent of determining whether the evidence in reference to the essential facts put in issue, and the reasonable inferences deducible therefrom, are such that, as fair-minded men, a jury should reasonably arrive at but one conclusion; and if the court so determines, and such conclusion is favorable to the defendant, the court is charged with the duty of rendering judgment in accordance with such determination."

The Supreme Court of Ohio in the similar case of *Bevan* v. *New York, C. & St. L. R. Co.*, 132 Ohio State 245, at page 252, quoted this Court as follows:

> "'"The case must be withdrawn from its (the jury's) consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."' Speculation and conjecture will not suffice. Gulf, M. & N. R. Co. v. Wells, 275 U.S. 455, 48 S. Ct. 151, 72 L. Ed. 370; Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819."

That the same rule is followed in Indiana is shown by the case of *Orey* v. *Mutual Life Insurance Co. of New York* (1939), 215 Ind. 305, cited by plaintiff. In that case the

plaintiff had the burden of proving the death of the assured had resulted from "violent external means." Doctors testified that the death could have been caused *only* by "violent external means." The Court said (p. 309-10).

> "In the instant case, if the testimony of the expert, who said that the hernia could have been caused by violent external means only, is eliminated, it leaves only the evidence that it might have been caused either by violent external injury, which might be assumed to have been accidental, or by an unusual strain, which might be assumed to have been the result of a voluntary act. The jury might infer that it was one or the other, but a determination without further evidence that it was one rather than the other would depend upon mere speculation or guess, and the trior of facts is not permitted to indulge in such inferences."

In *Pontiac-Chicago Motor Express Co.* v. *George Cassons & Sons* (1941), 109 Ind. App. 248, in affirming a judgment upon a directed verdict the Court said (p. 252):

> "Inferences to be drawn in favor of plaintiff by the trial court, in passing upon a motion to direct a verdict for the defendant, must be reasonable ones and not based on mere conjecture or speculation."

Likewise in harmony are the decisions of the Circuit Courts of Appeals cited by petitioner. All of these recognize the general proposition that a verdict cannot be based upon speculation and guess. For example, in the case of *Colonna* v. *Merchants Miners Transp. Co.* (1940), 112 Fed. (2d) 613, the Fourth Circuit Court of Appeals in affirming a verdict directed upon the same ground as here said:

> "Recoveries cannot be based upon pure surmise or mere guess. When a plaintiff seeks to recover

damages such recovery must be based upon some substantial evidence sufficient to support a verdict. The judge below properly directed a verdict for the defendant, under the evidence, and the judgment is accordingly affirmed."

Petitioner left the respondent's store on December 16, 1936. He later contracted pneumonia. Petitioner was undoubtedly exposed to many potential causes of pneumonia over which respondent had no control. His own physician who treated him at the time testified it would be purely guesswork on his part to attempt to determine the cause of petitioner's pneumonia. (R., p. 80.) The jury could have been in no better position than petitioner's physician.

POINT C

We agree that the law of Indiana applies as to the alleged estoppel and fraud theories.

In Indiana to invoke the doctrine of equitable estoppel the acts relied upon must be of an affirmative character and fraudulent.

Landers v. *Evers,* 107 Ind. App. 347, 349, 350;
Tinsley v. *Fruits,* 20 Ind. App. 534, 542.

Fraud itself is never presumed but must be proved by the party alleging it. The essential elements of actionable fraud in Indiana are representations, falsity, scienter, deception, and injury.

Edwards v. *Hudson,* 214 Ind. 120, 122;
Wills v. *Mooney-Mueller Drug Co.* (1911), 50 Ind. App. 193, 199;
Rochester Bridge Co. v. *McNeill* (1919), 188 Ind. 432, 439.

After leaving the respondent's store on December 16, 1936 the petitioner did not communicate with respondent until the letter of January 1, 1937, advising that his illness was worse "than anyone expected" and he would not return to work on January 4th as expected. (Stipulation Exhibit No. 1). Learning for the first time that petitioner would not be back on January 4th as expected, it advised petitioner by letter dated January 5, 1937 (Stipulation Exhibit No. 2): "Your salary will be paid from this office dating from Monday, January 4th." This was in accordance with respondent's practice of paying the salary of all trainees (such as petitioner) during illness—from the store until a replacement was made—from the New York office after a replacement was made. Thus the store was not charged with two salaries. (R. 245, 6, 253, 4.)

The only evidence concerning statements by the company with reference to the payment of petitioner's salary in addition to the letter of January 5th is the following statement attributed by petitioner to Boeve, Assistant Personnel Manager (R. 103):

> "There is no need to worry over money matters; your salary will be continued from this office."

Petitioner's theories of estoppel and fraud therefore depend entirely upon (1) the letter of January 5, 1937, (2) Boeve's statement, "There is no need to worry over money matters; your salary will be continued from this office," and (3) the fact that the salary was continued until after the statute of limitations had run and then was discontinued. Boeve's statement, like the letter, is explained by the company's policy with reference to payment of salary during illness.

Petitioner did not work from December 16, 1936 to March, 1937. (R., p. 62.) From March 20, 1937 to October 10, 1938, petitioner worked regularly and ostensibly had fully recovered from his illness until his foot began to bother him in October, 1938, when he went to Dr. Williams for a "check-up." (R., pp. 62, 63, 286.) He did not work from October 10, 1938 until December 12, 1938, when at his request and because he worried about his job he began to work part-time in Indianapolis. (R., pp. 72 and 76.) Respondent then allowed a reasonable time for petitioner to regain his health. After a few months had gone by and petitioner was still unable to do full work, Boeve went to Indianapolis to investigate. He conferred with petitioner's personal physician who advised him petitioner's condition would not improve. (R., p. 109.) Boeve then talked to petitioner and told him he should resign from the company and look around for a job where he would be off his feet entirely. (R., p. 109.) These facts fully explain why petitioner's employment and salary were terminated at the particular time that they were.

That petitioner himself was not misled is shown clearly by his own testimony. He admits being treated with absolute fairness. (R., p. 126.) He worried about his job and wrote letters to the company saying so (R., pp. 130-132), which he never would have done if he thought the company would pay his salary indefinitely or during disability. He resigned from the company (R., p. 81) without mentioning any claim against the company (R., p. 150). Even after leaving the employ of the company he never at any time mentioned a claim until two full years later when the complaint was filed. After consulting an attorney he filed a claim for compensation on April 27, 1940 (R., pp. 131-141),

which he never would have done if he felt he had a cause for damages of any kind. There was no evidence to support any of the above-mentioned elements of fraud.

CONCLUSION

The opinion of the Circuit Court of Appeals was correct and in all respects in conformity with applicable State law, and therefore in conformity with Erie Railroad v. Tompkins.

WHEREFORE, respondent respectfully submits the petition be denied.

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